87-1198
No.____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CROWN CORK & SEAL CO., INC.,
Petitioner

v.

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKALA and DORIS YOCUM, on behalf of themselves and all others similarly situated,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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60 pp

QUESTION PRESENTED

When a district court enters an interlocutory order granting injunctive relief on the merits, does 28 U.S.C. §1292(a)(1) confer appellate jurisdiction without requiring that one seeking appeal demonstrate that serious, perhaps irreparable, consequences flow from that order?

STATEMENT PURSUANT TO RULE 28.1

This Petition is filed on behalf of Crown Cork & Seal Co., Inc., which has no parent company but has the following subsidiaries (except wholly-owned subsidiaries) and affiliates: Société Nouvelle Baele Ganloff (France); Crown Corks of Malaysia (Malaysia); The Crown Cork & Seal Company (Nigeria) Ltd. (Nigeria); Crown Cork del Peru, S.A. (Peru); and Metalinas, S.A. (Spain).

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No.____

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CROWN CORK & SEAL CO., INC.,
Petitioner

v.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Crown Cork & Seal Co., Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 47 (3d Cir. 1987) and is reprinted in the Appendix to this Petition at A-1.

The Order and judgment of the District Court granting plaintiffs' motion for partial summary judgment is unpublished and is reprinted at A-11. The Memorandum and Order denying Crown Cork & Seal Co., Inc.'s motion to dismiss or for summary judgment is published at 656 F. Supp. 206 (E.D. Pa. 1987) and is reprinted at A-35.*

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1987. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTE

28 U.S.C. §1292(a)(1) provides:

> [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

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*References to the Appendix are cited as "A- ."

STATEMENT OF THE CASE

Respondents, Elizabeth McNasby and twelve other named female employees ("McNasby") of Petitioner Crown Cork & Seal Co., Inc. ("Crown Cork"), instituted this action in 1982 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, purportedly as a class action. The action was stayed by agreement of counsel pending appeal by McNasby to the Pennsylvania appellate courts of an earlier 1982 decision of the Pennsylvania Human Relations Commission ("PHRC").[1] The PHRC had conducted thirty-seven days of public hearings and had rendered a decision on the very same discrimination claims set forth in the complaint filed by McNasby in this action. Both the Pennsylvania Commonwealth Court, in 1983,[2] and the Pennsylvania Supreme Court, in 1985,[3] rejected the challenges made by McNasby to the PHRC's decision and affirmed. McNasby then appealed to this Court, which, in 1985, dismissed the appeal for want of a substantial federal question.[4]

In January, 1986, Crown Cork filed a motion to dismiss the District Court action, or for summary judgment, on the ground that the case was governed by the Full Faith and Credit Statute, 28 U.S.C. §1738, requiring that the District Court give claim preclusion effect to the Pennsylvania state court decisions. The District Court refused to do so and instead granted partial summary judgment in favor of McNasby.[5] The District

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1. PHRC Docket Nos. E-4027 and E-4029.

2. *Murphy v. Commonwealth of Pennsylvania Human Relations Comm'n*, 77 Pa. Commw. 291, 465 A.2d 740 (1983).

3. *Murphy v. Commonwealth of Pennsylvania Human Relations Comm'n*, 506 Pa. 549, 486 A.2d 388 (1985).

4. *Murphy v. Commonwealth of Pennsylvania Human Relations Comm'n*, 471 U.S. 1132 (1985).

5. McNasby had filed a cross-motion for partial summary judgment.

Court entered an order against Crown Cork that included final injunctive relief on the merits.

Crown Cork appealed to the Court of Appeals for the Third Circuit. On appeal, the parties' briefs were directed to the claim preclusion issue under 28 U.S.C. §1738 as interpreted in a number of this Court's decisions.[6]

The Court of Appeals for the Third Circuit (*Sloviter*, Stapleton, and Fisher (D. N.J.)) acknowledged that the District Court believed that the order and judgment it had entered constituted injunctive relief, and the panel correctly assumed that was so in considering the appeal. (A-7). Nevertheless, the Court of Appeals held, contrary to the clear language of 28 U.S.C. §1292(a)(1), that even in cases where injunctive relief is granted on the merits, those seeking to appeal under 28 U.S.C. §1292(a)(1) must demonstrate that serious, perhaps irreparable, consequences flow from the district court orders granting that relief. (A-8). The Court of Appeals held that there were no such consequences in this case and dismissed the appeal.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals For the Third Circuit Conflicts With Decisions of Other Courts of Appeals

The Court of Appeals' decision in this case conditions appeals of interlocutory orders granting injunctive relief on an *ad hoc* case-by-case analysis of "irreparable consequences." The decision is an unwarranted refusal to exercise appellate jurisdiction conferred by Congress in the clear language of 28 U.S.C. §1292(a)(1) and distorts this Court's decision in *Carson v. American*

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6. Principally, *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

Brands, Inc., 450 U.S. 79 (1981). Conflicting interpretations of 28 U.S.C. §1292(a)(1) and of *Carson* have resulted in widespread confusion, as evidenced by more than thirty decisions of the courts of appeals on this subject since 1981. The Court of Appeals' application of *Carson* in this case to defeat an appeal of an order granting injunctive relief conflicts with decisions of the Courts of Appeals for the Seventh, Ninth, Eleventh, Federal and District of Columbia Circuits.

In *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir.), *cert. denied sub nom. Belletire v. Parks*, 473 U.S. 906 (1985), the Court of Appeals for the Seventh Circuit held that interlocutory orders granting injunctions are appealable under §1292(a)(1) without regard to the *Carson* test. The District Court had entered an injunction requiring the State of Illinois to reimburse parents of certain institutionalized handicapped children for the living expenses that the children incurred. The District Court had not determined the amounts to be reimbursed. The State appealed. In holding that the order granting the injunction was appealable, the Court of Appeals found it unnecessary to address the question of irreparable harm:

> Only when the denial of a request for a permanent injunction is not definitive (for example, because the district judge has merely denied the plaintiff's motion for summary judgment, and the plaintiff may still get the injunction at the conclusion of the trial) is it not appealable under section 1292(a)(1). *Grants of permanent injunctions always are.*

753 F.2d at 1403 (emphasis added). The Court of Appeals for the Seventh Circuit followed this reasoning again in *Prohosky v. Prudential Insurance Company of America*, 767 F.2d 387, 391 n.4 (7th Cir. 1985).

The Court of Appeals for the Federal Circuit echoed the conclusion in *Parks* in *Woodard v. Sage Products*,

Inc., 818 F.2d 841 (Fed. Cir. 1987). There the Court of Appeals held that it had no jurisdiction over an appeal from a district court order granting summary judgment for the defendant, effectively dismissing plaintiffs' claim for injunctive relief. In an extended discussion of the cases in this area, the Court noted that, although at least one court had applied *Carson* in accepting jurisdiction over an appeal of an order explicitly granting an injunction,[7] "the Supreme Court in *Carson* expressly *limited* its holding to orders that have 'the *practical effect* of *refusing* an injunction.' " 818 F.2d at 850 n.6 (emphasis supplied; citation to *Carson* omitted).

Other courts of appeals have held orders *granting* injunctions appealable without regard to the *Carson* test of serious or irreparable consequences. In *In Re Steele*, 799 F.2d 461 (9th Cir. 1986), the Court of Appeals for the Ninth Circuit held that it had jurisdiction over an appeal from a disclosure order in a Freedom of Information Act suit, stating, without reference to *Carson*, that "the courts of appeals have jurisdiction of appeals from interlocutory orders of the district court granting injunctions . . . ." 799 F.2d at 465 (citation omitted). Again in *Marathon Oil Co. v. United States*, 807 F.2d 759 (9th Cir. 1986), *cert. denied*, ____U.S. ____, 107 S.Ct. 1593 (1987), the Court of Appeals for the Ninth Circuit held that it had jurisdiction under §1292(a)(1) to review the District Court's order granting summary judgment on the government's cross-claim for injunctive relief, without reference to *Carson*. The Court of Appeals for the Eleventh Circuit likewise held in *Schulner v. Jack Eckerd Corp.*, 706 F.2d 1113, 1114 (11th Cir. 1983) that "[i]t is well-established that the granting of an injunction is appealable as an interlocutory order even though the trial court may have reserved its determination of remaining issues, such as compensatory damages." *See*

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7. The decision referred to was *American Can Company v. Mansukhani*, 742 F.2d 314 (7th Cir. 1984).

also Securities and Exchange Commission v. Carriba Air, Inc., 681 F.2d 1318 (11th Cir. 1982).

The Court of Appeals for the Third Circuit's decision here also conflicts with a line of decisions of the Courts of Appeals for the Seventh and District of Columbia Circuits holding that the *Carson* test does not apply to appeals from orders that dispose of injunctive relief going to the merits of the case. In *Winterland Concessions Co. v. Trela*, 735 F.2d 257 (7th Cir. 1984), the Court of Appeals for the Seventh Circuit stated that, in this Court's recent decisions denying appeals under §1292(a)(1), the Court was addressing only orders that did not go to the merits of the case. The Court of Appeals held that "[s]ince the district court's order necessarily disposed of [defendant's] claims on the merits, including all requests for injunctive relief, we hold that the order dismissing the counterclaims is appealable under 1292(a)(1)." 735 F.2d at 261; *cf. Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir.), *cert. denied*, 475 U.S. 1066 (1986) (analyzing recent §1292(a)(1) cases and *Carson* test in terms of whether order went to merits).

Similarly, in *Center for National Security Studies v. Central Intelligence Agency*, 711 F.2d 409 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia Circuit held that *Carson* does not apply to interlocutory orders addressing injunctive relief going to the merits of the case. *Accord, I.A.M. National Pension Fund Benefit Plan A v. Cooper Industries, Inc.*, 789 F.2d 21 (D.C. Cir.), *cert. denied*, ____U.S. ____, 107 S.Ct. 473 (1986); *cf. Sims Varner & Associates, Inc. v. Blanchard*, 794 F.2d 1123 (6th Cir. 1986) (whether order addressed merits is a factor in determining appealability under §1292(a)(1)).

The decision of the Court of Appeals in this case dismissed an appeal of an interlocutory order granting final injunctive relief on the merits of McNasby's

claims.[8] As shown above, the Court of Appeals for the Third Circuit's denial of appellate jurisdiction on the basis of the *Carson* "irreparable consequences" test conflicts with the decisions of other courts of appeals. Resolution of this conflict will eliminate the widespread confusion that exists on this subject and, if the decision of the Court of Appeals in this case is not permitted to stand, will honor the bright-line rule on appealability of interlocutory orders granting injunctive relief on the merits that Congress has provided.

II. The Decision Below Presents a Substantial and Recurring Question Regarding the Interpretation and Application of 28 U.S.C. §1292(a)(1) and is a Substantial Departure From This Court's Prior Decisions

Congress enacted §1292(a) in order to provide "bright-line" rules for the courts of appeals and for litigants, recognizing that, notwithstanding the general policy against piecemeal appeals (*see* 28 U.S.C. §1291), certain types of interlocutory orders should be subject to immediate review. Congress has thus provided categorical definitions of orders entitled to immediate appeal

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8. The District Court's Order was an injunction, even though it was not explicitly labeled as such. It was an "order . . . directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than a preliminary fashion." *United States v. Western Electric Co.*, 777 F.2d 23, 28 n.12 (D.C. Cir. 1985).

The District Court's Order, unlike the PHRC decision appealed in the Pennsylvania state courts, was enforceable by contempt. The PHRC's decision could only be enforced by a separate action in equity. *See* 43 Pa. C.S. §960. Both the District Court and the Court of Appeals considered the District Court Order to be an injunction for purposes of appealability. Likewise, the relief ordered was on the merits of McNasby's claims. McNasby demanded injunctive relief in the Complaint, and the District Court granted relief that McNasby had demanded.

under §1292(a).[9] This case presents a fundamental and recurring question regarding the interpretation and application of 28 U.S.C. §1292(a)(1) — whether the courts of appeals may ignore Congress's categorical approach to appeals of interlocutory orders of the district courts that grant injunctive relief on the merits, requiring instead that one seeking appeal demonstrate that serious, perhaps irreparable, consequences flow from such orders.

Congress first provided for appeals of interlocutory orders in §7 of the Evarts Act of 1891, 26 Stat. 828. That Act conferred appellate jurisdiction of interlocutory orders granting or continuing injunctions. The "manifest intent of this provision" was not only to provide parties relief from injunctions that "might seriously affect [their] interests", but also "to save both parties from the expense of further litigation . . . ." *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525 (1897).[10] Appeals from interlocutory orders refusing and dissolving injunctions were added subsequently in recognition of "a developing need

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9. In recognition of the inevitable inadequacy of rules to meet all situations deserving similar treatment, Congress has also provided a means to appeal interlocutory orders based upon a case-by-case evaluation of enumerated factors by the district court and court of appeals. *See* 28 U.S.C. §1292(b). Section 1292(b) is not involved in this case, but the Court of Appeals for the Third Circuit acted as if §1292(a) is a comparable grant of discretion.

10. The Court of Appeals' refusal to exercise appellate jurisdiction, if permitted to stand, will cause both McNasby and Crown Cork precisely the kind of litigation expense that §1292(a)(1) was intended to prevent. The District Court in this case was plainly wrong in refusing to give claim preclusion effect to the Pennsylvania state court decisions under the Full Faith and Credit Statute. If the District Court were to certify a class in this case, there would be individual damage trials for every member of the alleged class before any "final judgment." On the other hand, immediate appellate review of this case will carry out the "manifest intent" of §1292(a)(1) by saving both parties from expensive litigation that can be avoided by proper application of the Full Faith and Credit Statute by the Court of Appeals.

to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

The appealability of interlocutory orders granting injunctions, established definitively in *Smith v. Vulcan Iron Works, supra,* has not since been questioned by this Court. Restrictive interpretations of the statutory right to an interlocutory appeal arose in part from the fact that *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932),[11] was being interpreted by courts of appeals to allow appeals from orders not specifically denying injunctions, but rather denying preliminary and procedural relief in cases involving injunctions.

Thus, this Court has restricted appeals from interlocutory orders that litigants have attempted to portray as denying injunctive relief. In *Baltimore Contractors, supra,* 348 U.S. 176, for example, this Court held that denial of a stay was not appealable under the predecessor to §1292(a)(1). In *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), this Court held that denial of a motion for summary judgment including a request for injunctive relief was not appealable, because it merely had the effect of a procedural order requiring trial and did not foreclose the claim for injunctive relief. In *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), this Court held that denial of class certification was not appealable under §1292(a)(1).

Carson v. American Brands, Inc., supra, again limited appeals, not from interlocutory orders *granting* injunctions, but from those arguably having the effect of *denying* injunctive relief. *Carson* involved an order

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11. This Court's decision in *General Electric* upheld appellate jurisdiction over an appeal from an order dismissing a case for lack of venue on the ground that the counterclaim for injunctive relief was thereby dismissed.

refusing to approve a consent decree that included injunctive provisions. The Court noted a conflict in the courts of appeals over the appealability of such orders and went on to hold that "[f]or an interlocutory order to be immediately appealable under §1292(a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction." *Carson v. American Brands, Inc.*, 450 U.S. at 84.

Finally, in *Stringfellow v. Concerned Neighbors In Action*, ____U.S. ____, 107 S.Ct. 1177 (1987), this Court held that *denial* of a motion to intervene, where the putative intervenor sought to assert a request for injunctive relief, was not appealable, stating specifically that "[t]his Court has made it clear that not all denials of injunctive relief are immediately appealable . . . ." 107 S.Ct. at 1183.

This Court's decision in *Carson* represented a limited judicial resolution of a conflict in the circuits with respect to interlocutory orders refusing to enter consent decrees. The decision below has extended the limited rule of *Carson* to every appeal under §1292(a)(1), thus giving "independent life" to the "irreparable consequences" test of *Carson*, a judicial step warned against by commentators:

> While the concern with irreparable consequences may properly be considered in developing new rules for unclear categories of cases, it must not be allowed to become a policy for ad hoc determinations of appeals jurisdiction according to evident convenience of individual cases.

C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure: Jurisdiction 2d §3924 at 52 (2d Ed. Supp. 1987).

Carson does not require that every interlocutory appeal under §1292(a)(1) be subjected to review for the nature of the consequences flowing from the order.

Rather, properly viewed, *Carson* is one of a line of this Court's decisions recognizing that denials of interlocutory relief in cases involving injunctions or having the "practical effect" of injunctions are not within the specific language of §1292(a)(1) and its predecessor statutes. It is appropriate to weigh the seriousness of the consequences of such denial to prevent unwarranted *expansion* of appeals of interlocutory orders beyond the scope intended by Congress. However, such analysis is not appropriate to *contract* appellate jurisdiction that Congress has clearly conferred.

Moreover, application of the *Carson* test to all appeals under §1292(a)(1) would have undesirable effects. Instead of looking to a bright-line rule of appealability, courts of appeals would be forced to engage in an *ad hoc* case-by-case analysis of the consequences in every such appeal, inviting, if not requiring, litigation over appellate jurisdiction. *Carson* preserves judicial resources because it limits appeals in borderline cases not clearly within the scope of §1292(a)(1). However, the Court of Appeals for the Third Circuit's expansive application of *Carson* will have the opposite effect and will undermine the efficient judicial administration that is the goal of both the categorical rule of §1292(a)(1) and of the holding of *Carson* itself.

This Court in the *Baltimore Contractors* case succinctly stated the correct rule:

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. . . . This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system.

348 U.S. at 181. The decision below is an "unauthorized reduction" of the jurisdiction conferred by Congress in 28 U.S.C. §1292(a)(1).

CONCLUSION

The Court of Appeals for the Third Circuit's decision is in conflict with decisions of other courts of appeals and is a distortion of this Court's decision in *Carson*. The elimination of a bright-line rule of appellate jurisdiction under 28 U.S.C. §1292(a)(1) should not be permitted to stand. A writ of certiorari should issue to review the decision below.

Respectfully submitted,

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January 15, 1988

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1085

ELIZABETH McNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH McGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKALA, and DORIS YOCUM, on behalf of themselves and all others similarly situated

v.

CROWN CORK AND SEAL CO., INC., and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, a/k/a SHEET METAL PRODUCTION WORKERS' UNION, LOCAL 266

CROWN CORK AND SEAL, CO., INC.,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 82-4258)

Submitted Under Third Circuit Rule 12(6)
September 8, 1987

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* Hon. Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

Before: SLOVITER and STAPLETON,
Circuit Judges, and
FISHER, *District Judge*•

(Opinion filed October 30, 1987)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Crown Cork and Seal Co. (Crown Cork), a defendant in a Title VII action pending in the district court, appeals from the court's orders denying its motion to dismiss or for summary judgment and granting partial summary judgment for plaintiffs. Crown Cork had sought the dismissal on the ground that the Title VII suit seeking make-whole relief was

barred by an earlier decision of the Pennsylvania Human Relations Commission (PHRC or the Commission) that found Crown Cork had engaged in wide-spread sex discrimination but that awarded primarily injunctive relief only. The parties' briefs were directed to the preclusion issue. Because we conclude that this court lacks jurisdiction over this appeal, we will dismiss without considering the merits.

I.

Facts

The procedural history of this case is complex and we discuss briefly only those facts relevant to our current disposition of the appeal. In February 1970, several female employees of Crown Cork complained to the PHRC about discrimination against them and other female employees. After investigating the allegations, the PHRC filed a Commissioner's complaint in December 1970 against Crown Cork and the Sheet Metal Workers' International Association, Local 266 (the Union), the employees' union representative. Thereafter, in May 1971, McNasby filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), and in June 1971, she filed a formal complaint with the PHRC asserting that Crown Cork and the Union were discriminating against all female employees. In October 1975, the PHRC filed an amended complaint because it had determined that its original complaint was defective in light of the decision of the Pennsylvania Supreme Court in *Pennsylvania Human Relations Comm'n v. United States Steel Corp.*, 458 Pa. 559, 325 A.2d 910 (1974).

The Commission conducted thirty-seven days of hearings between October 1978 and June 1980. It made 132 Findings of Fact and 39 Conclusions of Law

in August 1981 and issued a Supplemental Opinion and Order in May 1982. The Commission characterized the evidence as presenting "one of the most blatant patterns of sex discriminatory employment practices" that had ever been brought to its attention. App. at 138. It determined, *inter alia*, that Crown Cork "engaged in a pattern and practice of discrimination based upon the sex, female, of applicants and employees in hiring, job assignment, job transfer, compensation, layoff, and recall from layoff, on a continuing basis." App. at 129. The Commission found Crown Cork's system of sex-segregated job classification and plant seniority "unlawful *per se*" and concluded that the system "must be integrated for all purposes." App. at 132. The Commission also found that Crown Cork's system of department and shift seniority is "unlawful in its effects and may not be used as a basis for job advancement, layoffs, or recall." App. at 132.

The Commission awarded McNasby back pay for the period from the date she filed her complaint in June 1971 to December 31, 1975, but limited back pay for other eligible female employees to the five month period from July 30, 1975 to December 31, 1975.[1] The plaintiffs appealed the limited award and the Commission's decision was affirmed by the Pennsylvania courts. *Murphy v. Commonwealth of Pennsylvania Human Relations Comm'n*, 77 Pa. Commw. 291, 465 A.2d 740 (1983), *aff'd*, 506 Pa. 549, 486 A.2d 388 (1985), *appeal dismissed*, 471 U.S. 1132 (1985).

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1. In making its back pay award the Commission determined that the amended complaint did not relate back to the original 1970 complaint and thus, in applying the relevant 90-day statute of limitations, limited back pay for female employees other than McNasby, who had filed her own complaint, to the period from the tolling of the statute of limitations. *See* App. at 139-40.

On September 29, 1982, while the state court appeals were pending, McNasby and twelve other members of an asserted class of female employees of Crown Cork filed this action in federal court against Crown Cork and the Union seeking class-wide relief for alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, breach of the collective bargaining agreement, and breach of the duty of fair representation by the Union. By order entered December 20, 1982, all proceedings in the federal action were stayed pending the outcome of the state court proceedings. After the case was returned to active status, Crown Cork filed its motion to dismiss the action or for summary judgment on the ground that plaintiffs' state court action barred a subsequent federal court action. Plaintiffs filed a cross-motion for partial summary judgment.

The district court granted plaintiffs' motion for partial summary judgment, holding that the PHRC's findings of facts on the merits as to both the McNasby individual complaint and the PHRC complaint are entitled to preclusive effect. In a separate order entered the same day, the court denied defendants' motion to dismiss or for summary judgment, holding that "[t]he remedy fashioned by the PHRC for McNasby and the other class members denied to them on their federal claims the make-whole remedy to which they were entitled under Title VII." App. at 616. Crown Cork appeals from those orders.

II.

Appealability

In response to this court's request that the parties address our jurisdiction over this appeal, Crown Cork, acknowledging that the district court denied its motion for certification pursuant to 28 U.S.C.

§ 1292(b), asserts that the orders are appealable under 28 U.S.C. § 1292(a)(1). That section provides:

> [T]he courts of appeals shall have jurisdiction of appeals from:
>
> Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Crown Cork contends that the district court granted injunctive relief within the meaning of this section.

Patently, the district court's order denying Crown Cork's motion to dismiss or in the alternative for summary judgment is not appealable under 28 U.S.C. § 1292(a)(1). Review of such orders must await the conclusion of the case in the district court. *See, e.g., Switzerland Cheese Ass'n, Inc. v. E. Hornes Market, Inc.*, 385 U.S. 23, 24 (1966); *Boeing Co. v. International Union*, 370 F.2d 969, 970 (3d Cir. 1967); *see also Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 154 (3d Cir. 1984).

Thus, the district court's order granting partial summary judgment in favor of the plaintiffs is the only possible remaining basis for our jurisdiction. That order provides that "this court hereby finds that defendants [Crown Cork and the Union] are bound by the Findings of Fact and Conclusions of Law, established in the final decision of the Pennsylvania Human Relations Commission on May 10, 1982 (PHRC Docket Nos. E-4027 and E-4029), and set out in full below, and judgment is hereby entered as follows." App. at 594. The order then sets out verbatim the 132 Findings of Fact and 39 Conclusions of Law entered by the PHRC.

The specific Conclusions of Law to which Crown Cork points as embodying injunctive relief are:

> 27. Respondent Crown's current system of sex-segregated job classification and plant seniority is unlawful per se and must be integrated for all purposes.
>
> 28. Respondent Crown's current system of department and shift seniority is unlawful in its effects and may not be used as a basis for job advancement, layoffs, or recall to employment unless plant seniority among competing employees is equal.

App. at 611.

Crown Cork notes that the district court, in denying Crown Cork's request for certification pursuant to 28 U.S.C. § 1292(b), agreed with Crown Cork's assertion that its adoption of the PHRC's conclusions of law constitutes injunctive relief, *see* Transcript of Summary Judgment Motion Hearing, Feb. 27, 1987, at 17-20. However, we must independently determine our jurisdiction and are not bound by the district court's characterization of its own order. The Supreme Court has made clear that this court has a "special obligation" to satisfy itself of its own jurisdiction in every appeal presented to it. *See Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331 (1986).

In establishing the jurisdiction of the courts of appeals, Congress adopted "'the final judgment rule [as] the dominant rule in federal appellate practice.'" *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (quoting 6 Moore, Federal Practice 113 (2d ed. 1953)). Strong policy reasons, including that of "promoting efficient judicial administration" undergird that rule. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S.

368, 374 (1981). The Supreme Court has cautioned that section 1292(a)(1), as an exception to the final judgment rule, must be construed narrowly to conform to the congressional policy against piecemeal appeals. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978); *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. at 24.

It is necessary, but not sufficient, for appealability under section 1292(a)(1) that the order be one that has the effect of either "granting, continuing, modifying, refusing or dissolving" an injunction. In addition, the appeal must "further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'" *Carson v. American Brands, Inc.*, 450 U.S. at 84 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). The district court's order in this case fails to meet this requirement.[2]

The district court's order merely adopted the findings and conclusions previously entered by the PHRC. As the Supreme Court of Pennsylvania stated, "[t]he Commission also directed [Crown Cork] to implement an affirmative action program; to make

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2. We need not decide in this case whether the possibility of a contempt citation which may follow the grant, but not the denial, of a preliminary injunction is a factor to be considered in finding serious or irreparable consequences. Even if the district court's order adopting the Commission's findings is viewed as the grant of an injunction, which we have assumed *arguendo* in the text, defendants were already at risk if they disobeyed the state agency's order. Our opinion in Tokarcik v. Forest Hills School District, 665 F.2d 443, 446-47 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), did not assume that the grant of an injunction would *per se* have "serious, perhaps irreparable, consequences" but instead discussed the particular consequences that warranted immediate appeal.

good faith offers of reinstatement to each female employee who was laid off while a male of lesser seniority was retained; and to integrate their shift, department, and plant seniority systems." *Murphy v. Commonwealth of Pennsylvania Human Relations Comm'n*, 506 Pa. at 555, 486 A.2d at 391. Thus, Crown Cork was already legally bound by the Pennsylvania proceedings to implement the relief provided for in the conclusions of law adopted by the district court.

We need not decide whether, under these circumstances, the district court's order can properly be characterized as an order which "has the practical effect" of granting an injunction,[3] because it is evident that the order does not meet the requirement that it have "serious, perhaps irreparable, consequence[s]." *Carson v. American Brands, Inc.*, 450 U.S. at 84. A duplicative injunction by the federal courts cannot in any way affect Crown Cork's obligation to adhere to the injunctive relief already directed in the state proceedings.

This case is the converse of that presented in *Carson v. American Brands, Inc.* In *Carson*, the Supreme Court held that the district court's interlocutory order refusing to enter a consent decree negotiated between an employer and its employees who had brought an employment discrimination action was appealable under 28 U.S.C. § 1292(a)(1). The Supreme Court treated the district court's order as an appealable interlocutory injunction because the employees were being denied an immediate restructuring of the

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3. Although Crown Cork asserts that "the injunctive relief Ordered by the District Court has effects going beyond the PHRC's decision," Memorandum of Defendant-Appellant Crown Cork & Seal Regarding Appealability of the District Court's Orders of January 15, 1987 at 7 n.3, it offers no support for that proposition, and we have not found any.

employer's transfer and promotional policies which the consent decree would have effected. It explained that the "'serious, perhaps irreparable consequences'" which the district court's order effected could therefore be "'effectually challenge[d]' only by an immediate appeal." 450 U.S. at 90. In contrast, Crown Cork is already bound by the Pennsylvania decisions to implement the relief provided for in the conclusions of law. It can, therefore, hardly be said that "serious" or "irreparable" consequences would flow from the district court's order.

III.

Conclusion

For the foregoing reasons, we will dismiss this appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKALA and DORIS YOCUM, on behalf of themselves and all others similarly situated,	:	CIVIL ACTION NO. 82-4258
Plaintiffs	:	
v.	:	
CROWN CORK AND SEAL CO., INC.	:	
and	:	
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, a/k/a SHEET METAL PRODUCTION WORKERS' UNION LOCAL 266,	:	
Defendants	:	

ORDER

And Now, this 14th day of January, 1987, this court hereby finds that defendants, Crown Cork and Seal Company, Inc. and Sheet Metal Workers' International Association, AFL-CIO, are bound by the Findings of Fact and Conclusions of Law, established in the final decision of the Pennsylvania Human Relations

Commission on May 10, 1982 (PHRC Docket Nos. E-4027 and E-4029) and set out in full below, and judgment is hereby entered as follows:

Findings of Fact:

1. Respondent Crown Cork and Seal Company, Inc. (hereinafter "Crown") is a corporation doing business within the Commonwealth of Pennsylvania with its international corporate headquarters located at 9300 Ashton Road, Philadelphia, Pennsylvania, along with a facility designated at Plant No. 1.

2. Respondent Sheet Metal Workers' Union, Local No. 266 (hereinafter "Union" or "Local 266"), affiliated with the Sheet Metal Workers' International Association, AFL-CIO, is a labor organization which had and continues to have offices at 6445 Frankford Avenue, Philadelphia, Pennsylvania.

3. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission"), by its Executive Director, Homer C. Floyd, filed a complaint against Crown and Local 266 at Docket No. E-4027, on December 20, 1970, alleging unlawful patterns and practices of sex discrimination in recruitment and hiring, initial job assignment, promotions, overtime, layoffs and recall from layoffs.

4. Elizabeth McNasby filed a complaint of unlawful sex discrimination against Crown and Local 266 at Docket No. E-4249 on behalf of herself and other similarly situated female employes at Plant No. 1 on or about June 11, 1971, which stated that Crown and Local 266 consorted to cause her layoff improperly because she was female, and "have prevented her, as well as all other females, from enjoying equal job opportunities. . . .".

5. On October 27, 1975, the Commission filed an amended complaint at Docket No. E-4027 setting forth very detailed allegations of unlawful sex discrimination against Respondents Crown and Local 266.

6. Eleanor Neyer, Joan Murphy, Sarah Cooper, Margaret Felmey, Lorraine Mason, Virginia Knowles, Doris Yocum, Edith McGrody, Marie Pekala, Theresa Cheplick, Henrietta

Hunter, Ann Jacyszyn, and Theresa Reed, all incumbent or past employees of Crown, executed affidavits in 1975 and became individual named complainants in the amended complaint.

7. The Commission's original complaint made allegations that were general in nature. It consisted of 2 pages. The amended complaint was 34 pages, included very specific charges, was brought on behalf of several identified groups of female employes, and included allegations relating to the 13 individually named complainants.

8. The Commission initiated complaint at Docket No. E-4027, as amended, and the individual complaint of Elizabeth McNasby at Docket No. E-4249, were joined for purposes of administrative processing, including investigation, finding of probable cause, attempted conciliation, and public hearing.

9. Complainant Ann Jacyszyn was employed by Crown until 1966, when she was laid off and never recalled.

10. Complainants Eleanor Neyer, Joan Murphy, Margaret Felmey, Lorraine Mason, Virginia Knowles, Doris Yocum, Edith McGrody, Marie Pekala, Theresa Cheplick, and Henrietta Hunter were all laid off from employment at Crown for the last time between 1969 and 1971 and were never employed by Crown thereafter.

11. Complainant Sarah Cooper was employed at Crown until February 28, 1974, when she became disabled. From then through the dates of these hearings she has received disability retirement payments.

12. Complainants Theresa Reed and Elizabeth McNasby were continuously employed by Crown at all times from July 9, 1969 at least through the time of the PHRC's Public Hearing ending June 17, 1980.

13. During the period July 9, 1969 to December 31, 1975, Crown hired 50 males and no females. In the Philadelphia Standard Metropolitan Statistical Area for this time period, females comprised 30.6% of the available labor market in the non-durable industry category.

14. Between July 9, 1969 and December 31, 1975, 590 males or 62.6% of Crown's production and maintenance employes at Plant No. 1 were male; 352 or 37.4% were female.

15. Between 1971 and 1975 aggregate employment of females at Plant No. 1 in the production and maintenance unit dropped from 26.3% of the work force to 20.5% of the work force.

16. Some time in the early 1950's Crown adopted a system of sex-segregated job classifications.

17. From that time until April 1967, each collective bargaining agreement between Local 266 (or its predecessor unions) and Crown set forth a group of higher rated male jobs and a second group of lower rated female jobs.

24. At all times from July 9, 1969 to December 31, 1975, new employes at Plant No. 1 have been assigned to their initial shift and department by Crown's Personnel Office, and to their initial job within their department and shift by their department/shift foreman. Men have always been initially assigned to home shifts and departments in which male job openings existed, and to a particular male job within that home department/shift. No new women were hired during this period.

25. The sex-segregated job classification and seniority systems employed by Crown and acquiesced to by Local 266 were justified by neither any bona fide occupational qualification nor by any business necessity.

26. The seniority system, to the extent that it utilizes seniority measures other than plant seniority and to the extent that it perpetuates the effects of past discriminatory practices, is unlawful.

27. A dual roster of plant seniority embodying the date of original hire at Plant No. 1 or its predecessor plant has been and continues to be maintained in the Personnel Office on a sex-segregated basis.

28. Men's cards are filed chronologically in one section of a set of files known collectively as the "plant seniority board" and women's cards are filed in a separate section of the same "plant seniority board."

29. Similar sex-segregated dual rosters of "home shift" and "home department" seniority are also maintained in the same location and are known as the "department seniority boards."

30. As a result of this system, there are dual ladders of job progression within all gender integrated departments. (Some departments are gender segregated, having only men's jobs or only women's jobs.)

31. At all times since July 9, 1969, the collective bargaining agreements in force between Crown and Local 266 have provided that employes are to be laid off by inverse order of their date of initial hire at Plant No. 1 (or its predecessor plant on Erie Avenue). In fact, however, the sex-segregated plant seniority board has been and is still today the sole system used for purposes of layoff of employes at Plant No. 1.

32. At any time when Crown finds it necessary to reduce the number of personnel working in men's jobs, it uses this roster to locate the men with lowest plant seniority. These men are then ordinarily laid off. Whenever Crown finds it necessary to reduce the number of employes in women's jobs, the sex-segregated seniority board is utilized to select the women with lowest plant seniority who are then laid off.

33. In 97.7% or 1311 of the 1342 instances where females were laid off between July 9, 1969 and December 31, 1975, less senior males with equal or lower job classifications were retained in the employ of Crown within the production and maintenance unit at Plant No. 1.

34. Females were disproportionately subjected to layoffs during the period July 9, 1969 to December 31, 1975. There occurred 2764 layoffs during this time. Although females constituted 37.4% of all persons employed during the period, 48.6% of all layoffs were of female employes.

35. The mean duration of layoffs involving males during the period July 9, 1969 to December 31, 1975 was 33.5 days; the median was 17.4 days. The mean duration of layoffs involving females during the period was 45.9 days; the median was 23.8 days.

36. Although women constituted 37.4% of the production and maintenance unit work force during the period July 9, 1969 to December 31, 1975, they incurred 61.5% of the time spent in layoff status (76,198 days out of 123,977 total employe days on layoff).

37. At all times since July 9, 1969, Crown has followed a practice of recalling employes from layoffs, based upon the same system of sex-segregated plant seniority used for layoffs.

38. When women's jobs must be filled, Crown recalls women from layoff based upon their plant seniority as shown on the sex-segregated seniority board.

39. Between July 9, 1969 and December 31, 1975 there were 975 instances where females remained in layoff status when males, with lower job classifications and with less seniority, were recalled to employment in the production and maintenance unit at Plant No. 1.

40. Between July 9, 1969 and December 31, 1975, when there were an insufficient number of men on layoff to fill vacancies in male jobs, new men were frequently hired in lieu of recalling female employes on layoff status.

41. On some occasions, when additional women's jobs have had to be filled to meet production schedules but men have been slated for layoff during the same week based on reduced production schedules for those departments with a larger number of men's jobs, Crown has assigned these men (who otherwise would have been laid off) to fill the women's jobs "temporarily." Female employes who would otherwise have been recalled to fill the female vacancies have simply remained on layoff.

42. Crown and Local 266 attempted to justify such departures from ordinary practice on the theory that each case was an emergency — i.e., Crown could not afford to wait for women on layoff to respond to telegrams ordering them back to work. However, there are apparently no instances of Crown assigning women to do men's jobs in similar "emergency situations."

43. In some cases, females with many years of plant seniority who never would have been laid off except for the sex-segregated seniority stystem, were kept out on layoff status so long that their rights to recall, pursuant to the terms and provisions of the applicable collective bargaining agreement, expired.

44. During the period from July 9, 1969 through December 31, 1975, there were 20 such instances when female can workers were terminated from employment because they were

on layoff in excess of 3 years. In no case during this period was a male can worker ever kept on layoff for so long that his recall rights expired.

45. In another twenty-two instances, between July 9, 1969 and December 31, 1975, females with substantial plant seniority felt compelled to accept "early retirement" while on layoff status to avoid expiration of recall rights. No male could be identified to elect early retirement during this period.

46. In the late 1960's and early 1970's, the effects of automation began to substantially impact upon female employment at Plant No. 1. Women's jobs were disproportionately eliminated and the successor jobs, if any, were generally higher rated and classified as men's jobs.

47. This situation resulted in women with substantial seniority being laid off for extended periods, while males with far less seniority continued to work and occasionally while new male employes were being hired.

48. As sex-segregated layoffs became more frequent and severe, female employes at Plant No. 1 began to complain to Crown and to Local 266.

49. After women began to complain about sex discrimination at Plant No. 1, officials at Crown, with the assistance of Local 266, intentionally and systematically attempted to get as many female employes as possible to sign ambiguous forms purporting to implement equal employment opportunity, but which were in fact an attempt to secure waivers of women employes' rights to equal employment opportunity and to create a "paper record" which might shield Crown from potential liability for unlawful sex discriminatory practices.

50. Crown and Local 266 attempted to show that female can workers had been extended bona fide, good faith offers of men's jobs, but had knowingly and intentionally waived their rights to such jobs by means of written "waivers."

51. The first such allegedly bona fide, good faith offers of men's jobs were made in Spring, 1970 to a group of approximately 12 women at a meeting which took place at the offices of Local 266. Those women present were asked to list or identify

on a piece of paper which men's jobs they could do. No clear waiver of rights was included.

52. Despite expressions of interest in various men's jobs by women present at this meeting, the actual job offers made during or after this meeting were limited to a single job in the inspection department, given to Elizabeth McNasby.

53. Several other women were allowed to take an "inspector's test" or to work briefly as inspector trainees, but were then told they had failed the test or were laid off based upon department seniority or sex-segregated plant seniority. (Prior to this time no man was ever administered a test when seeking an inspector position).

54. The second occasion when "waivers" were obtained was during the period beginning on or about April, 1971 and continuing on a sporadic basis, until about 1974. These "waivers" were proferred to an indeterminate number of women then on layoff status or about to be placed on layoff status.

55. The "waivers" listed titles of jobs traditionally available only to men. The women were advised to check those in which they were interested and that they would thereby be relinquishing their rights to any others.

56. Another set of forms purporting to offer promotional opportunities to men's jobs was proffered during May and June of 1973 to certain women then actively employed at Plant No. 1 and neither on layoff status nor about to be placed on layoff status. These forms and the procedure used for making the offers and signing the forms were substantially identical to that utilized for the offers just described in these findings. The forms also included purported waivers of rights to positions in which no affirmative interest was indicated.

57. None of the forms utilized by Crown with the Union's acquiescence can be considered to be good faith offers of equal job or promotional opportunities.

58. The signers of these forms cannot be considered to have knowingly intended to waive their legal rights to be assigned to jobs regardless of sex.

59. Many of the women lacked sufficient formal education to fully appreciate the legal significances of the proffered "waiver" documents.

60. The offerees were materially misled as to the possible legal consequences of the documents by Crown and Local 266 officials.

61. The women involved had historically been excluded from many all male departments and were thus unfamiliar with the actual job duties of many of the listed jobs.

62. At the time of the offers, job descriptions were generally not made available to the women.

63. The women had no meaningful opportunity to discuss their decision with a lawyer, spouse or other disinterested party as they were expected to sign "on the spot" after seeing the documents for the first time.

64. The women were never offered the opportunity to retain copies of the documents which they were to sign.

65. No male employe was ever tendered such a form or otherwise asked to waive his rights to jobs at Plant No. 1.

66. Many women who indicated on their form that they were willing to accept assignment to jobs on the lists were never assigned to any of the jobs in which they indicated an interest.

67. Few of the jobs listed on the forms were actually available.

68. Not all male job titles in the production and maintenance unit were listed on the forms.

69. The forms did not reveal how Crown would make use of them and what would be the duration of their effectiveness.

70. The forms did not reveal what, if any, steps a woman could undertake to revise the preferences she had indicated if she subsequently changed her mind.

71. On those occasions when women indicated an interest in assignment to a particular men's job, they were frequently discouraged by officials of both Crown and Local 266.

72. Crown explained to the women that if a female employe decided to enter into a male job in other than her home department she would have to relinquish or waive her seniority rights in her current home department and begin to accrue

departmental seniority in a new department. (This was the same for any employee at Crown, male or female, i.e. when they moved into a new department they had to start at the bottom in that department).

73. As a pre-condition to placement, many of the jobs required substantial experience in lower rated department jobs, but women had always been excluded from some of those jobs.

74. Crown officials treated women who refused to sign the forms exactly the same as those who signed and failed to check any of the jobs thereon.

75. Crown frequently relied upon oral representations of third party fellow employes that particlar women would refuse assignments to any man's job, and did not inquire further.

76. Despite self-serving claims that all females were systematically contacted to ascertain their willingness to accept assignment of men's jobs, neither Crown nor Local 266 kept any record of which women had been offered a man's job or asked to sign a "waiver" form, or when such contacts were initiated. In fact, many women were never contacted at all, and many others were spoken to only once or twice, rather than before every layoff.

77. Crown made only the most limited use of the waiver forms in connection with employment decisions after they were signed. Originals of the forms were given to Crown's attorneys sometime before 1975 and no copies were kept in the Personnel Office, nor was the information thereon transferred to any other office record.

78. With respect to those women who indicated on the forms a willingness to work male jobs, Crown rarely, if ever, consulted their forms to determine which particular jobs they had expressed interest in. Rather they were treated as being eligible for any male job to which Crown wished to assign them.

79. The process of offering male jobs to incumbent and laid off females by use of the "waiver" documents and by less formal means resulted in few women actually achieving assignment to male jobs.

80. Elizabeth McNasby, who was successful in moving into the Inspection Department as a result of the "offer" of men's

jobs to women made at the Spring, 1970 meeting, was repeatedly liad off from her inspector job thereafter because she was the lowest in department seniority.

81. Upon all but the last of several occasions on which waivers were proffered to McNasby she failed to list any jobs in which she was interested and refused to sign the forms because of her distrust of Crown's motives in seeking execution of the forms.

82. Computer analysis, as set forth in Exhibits C-43 through C-46 introduced at the hearing, revealed that Elizabeth McNasby's anticipated earnings at Crown based upon her seniority and in the absence of sex discrimination, would have exceeded her actual earnings by the following amounts:

1971 - $4463.35
1972 - $6510.80
1973 - $6977.59
1974 - $7887.78

83. Women who were reassigned to male jobs after July 7, 1969, in accordance with the waiver scheme or by any other means, were treated as if they were men for seniority purposes so that to the limited extent that women appeared on the male seniority list, it was effectively an integrated list.

84. Women who were reassigned to male jobs were permitted to opt out of the integrated seniority list and go back to the female list if they so chose.

85. At no time during the period July 9, 1969 to December 31, 1975 were more than 12 women on the integrated seniority list for a particular calendar year.

86. During 1971, while at least 250 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 5.2% of all female employes, were on the integrated seniority list. only 1 of the 5 was on the integrated list for 12 months.

87. During calendar year 1972, while at least 221 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 6, less than

3% of all female employes, appeared on the integrated seniority list. Only 3 of the 6 were on the integrated list for 12 calendar months.

88. During calendar year 1973, while at least 180 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 10, slightly more than 5% of all female employes, appeared on the integrated seniority list. Only 6 of the 10 appeared on the integrated list for the entire 12 month period.

89. During calendar year 1975, while at least 118 females were employed or possessed employment rights at Plant No. 1 in the production and maintenance unit, a total of 12, slightly more than 10% of all female employes, appeared on the integrated seniority list, all for the entire calendar year.

90. Those female employes who attained integrated seniority status for only part of any calendar year were relegated to female seniority status for all periods during which they did not appear on the integrated list.

91. All remaining female employes had only segregated female seniority status.

92. From July 9, 1969 to December 31, 1975, no more than 18 of the 352 female production and maintenance unit employes have ever been assigned by Crown to perform one or more of the men's jobs.

93. Whenever one of these 18 workers were performing a man's job, her plant seniority and department/shift seniority cards were retained on the female sections and the department/shift and plant seniority boards with a red tag affixed.

94. A comparison of job titles worked during 1970 at Crown's Plant No. 1 in the production and maintenance unit with the job titles worked during 1975 discloses little progress toward ending the pattern of segregation. In 1970, of 104 job titles worked, 61 were all male and 33 were all female. Only 10 job titles, or 9.6% were integreated. By 1975, of 76 job titles worked, 43 were all male, 19 all female, and 14, or 18.4% integrated.

95. An examination of employe incumbency data, as of December 31, 1975 by Home Department, discloses a pattern of

total exclusion of female employes from 4 departments encompassing 112 out of 281 production and maintenance jobs.

96. Department 29, the Drawn and Iron Department ("D&I") due to its advanced technology, has been the fastest growing department at Plant No. 1 since it began operation in the early 1970's. (Because of Crown's use of departmental seniority rapid department growth virtually insures an employe rapid promotion within a department, especially a new department.)

97. Initially, there was no posting to announce the availability of positions in Department 29. Employes were transferred into the new department based upon subjective appraisals of their experience and ability made by Crown's Personnel Department with advice from Local 266.

98. It was not until October 28, 1974 that Crown made any attempt to offer positions in Department 29 to female employes working at Plant No. 1 and not until October 30, 1974 that Crown informed some female employes on layoff status of the availability of openings on the D&I lines.

99. Even on those earlier occasions when Crown offered traditionally male jobs to certain female employes, jobs on the D&I lines were never included in the list of jobs allegedly available.

100. At the time of the PHRC's Public Hearing (which was completed on or about June 17, 1980), 44 male and only 2 female employes were working in Department 29 on the first shift. The two females had been temporarily placed in the department a few days before the public hearing in these cases began. No home department employee in Department 29, first shift was female.

101. As of December 31, 1975, the average plant seniority for all males employed between July 9, 1969 and December 31, 1975 was 20.3 years. The average plant seniority for females was 28.8 years.

102. The employment work force profile at Crown shows that, despite the higher average seniority of female employes, females were disproportionately clustered in the lower rated and lower paid job classifications.

103. Positions in the production and maintenance unit at Crown are compensated in accordance with a system of job codes as set forth in the applicable collective bargaining agreement ranging from the lowest paying Code 4 jobs to the highest paying Code 35 jobs.

104. As of December 31, 1975, the mean job Code for males was 23.8 and the median was 23.0. For females the mean was 13.7 and the median was 11.0.

105. As of December 31, 1975, statistical analysis revealed that the mean job code would be 29.0 for females, 18.9 for males, if attainment were based solely on plant seniority. If based solely on department/shift seniority, mean expected job code attainment would be 19.5 for females, 21.9 for males.

106. From July 9, 1969 through December 31, 1975, men have been allowed to perform overtime work on both men's job and women's jobs while women have been restricted to a portion of the overtime available on women's jobs.

107. During calendar year 1971, female employes earned on the average $3476.00 per employe less than simliarly situated male employes.

108. During calendar year 1972, female employes earned an average of $2,954.00 per employe less than situated male employes.

109. During calendar year 1973, female employes earned an average of $3176.00 per empolye less than similarly situated male employes.

110. During calenadar year 1975, female employes earned an average of $3976.00 per employe less than similarly situated male employes.

111. After July 9, 1969, responsible officials of Crown and Local 266 knew or should have known of the prohibitions against sex discrimination in employment contained in state and federal law.

112. Some Crown managerial and Local 266 officials held stereotypic preconceptions and discriminatory attitudes toward female employes, particularly with respect to female abilities to

perform "strenuous" and "dirty"-type jobs. These preconceptions and attitudes affected employment related decisions during the period July 9, 1969 to December 31, 1975.

113. At all times material to this litigation, production and maintenance employes at Crown's Plant No. 1 were represented for purposes of collective bargaining by respondent Local 266.

114. At all times material to this litigation, Crown and Local 266 were signatories to collective bargaining agreements covering production and maintenance departments in Plant No. 1.

115. At all times material to this litigation, all employes covered by the collective bargaining agreements between Local 266 and Crown were required, after an initial 30 day grace period, to join Local 266, pay initiation fees and dues, and to maintain union membership as a conditon of continued employment at Crown.

116. Officials and agents of Local 266 were at all times aware of the sex discriminatory acts and practices of Crown.

117. Union officials had access to and examined the transfer and layoff lists every week in order to determine whether employes were being properly transferred and laid off. They also had access to the recall list for each week.

118. Local 266 has always received notice when the recall rights to employes at Plant No. 1 expired.

119. Representatives of Local 266 have always had knowledge that weekly "manning" schedules were submitted by each department foreman on a sex-segregated basis.

120. Subsequent to July 9, 1969, Local 266 negotiated three new collective bargaining agreements with Crown covering workers at Plant No. 1, effective respectively on April, 1970, April, 1973, and April, 1976. On none of these occasions did Local 266 make any attempt whatsoever to obviate through bargaining or to eliminate or reduce sex discrimination at Crown or to mitigate its effects on female members of Local 266.

121. Local 266 persistently failed to enforce the plant seniority provision of the collective bargaining agreement despite full knowledge that Crown's breach of that provision,

particularly with respect to layoffs and recalls, consistently and disproportionately disadvantaged female employes.

122. At no time has Local 266 filed any grievance, urged any of its members to file a grievance, initiated a lawsuit, complained orally or in writing to Crown, or taken any other action of any sort whatsoever related to enforcement of the non-discrimination provision of the collective bargaining agreement despite full knowledge of the pattern and practices of sex discriminatory behavior being engaged in by Crown.

123. At all times since July 9, 1969 Local 266 has effectively refused to investigate or prosecute the numerous grievances of its female member alleging sex discrimination at Crown.

124. The problem of female members of Local 266 being improperly laid off was well known to the Union and discussed at shop steward's meetings. However, nothing was done about it, even though grievances were filed.

125. Approximately 100 female members of Local 266 signed a written grievance on or about November 1, 1969 complaining about continuing sex discrimination employment at Plant No. 1.

126. After the grievance was signed, it was given to Pasquale Coia, head shopsteward for delivery to Herman Tedeschi, President of Local 266, but Local 266 took no further meaningful action regarding the grievance.

127. At all times since July 9, 1969, the final step in the applicable grievance procedure has been arbitration. From that time to the present, Local 266 has never taken any case involving any woman to arbitration though complaints involving men have been taken to arbitration.

128. Local 266 has been governed by the Constitution and Ritual of the Sheet Metal Workers International Union, AFL-CIO at all times since 1966. The Constitution requires that the employes in layoff status be given an opportunity to use withdrawal cards in order to avoid reinstatement fees each time they are recalled to work. Local 266, contrary to this requirement, has never given its members an opportunity to utilize withdrawal cards. Instead, at all times material to this litigation, whenever employes were in layoff at Crown's Plant No. 1, they

were required to pay monthly dues or upon recall to pay a "reinstatement" fee of between $15 and $30 to Local 266.

129. Since female members of Local 266 were laid off proportionately with greater frequency than male members, the brunt of this particular policy fell most heavily on the female members.

130. At all times from July 9, 1969 or earlier up to December 31, 1975 officials of Local 266 have actively and in concert with Crown worked to maintain sex discriminatory practices in effect at Crown, including the sex-segregated system of job classification prevailing at Plant No. 1, and have sought to insure the layoff, transfer, promotion and recall were done strictly by sex-segregated plant and department seniority.

131. Local 266 officials have actively assisted Crown management in its attempts to get female employes at Plant No. 1 to sign documents ostensibly waiving their rights to equal employment opportunity. They personally reviewed and approved forms calculated to obtain uninformed waivers of these rights and they participated in meetings on numerous occasions where these forms were used.

132. Assertions by officials of Local 266 that they had helped to enforce the sex-segregated seniority system and sex-segregated job classification system only because their female members demanded it were self-serving and not credible.

Conclusions of Law:

1. The Pennsylvania Human Relations Commission (hereinafter "Commission" or "PHRC") has appropriately exercised jurisdiction over the parties to and the subject matter of the complaints upon which these hearings in Docket Nos. E-4027 and E-4249 were convened.

2. Crown Cork and Seal (hereinafter "Crown") at its Plant No. 1 is an employer within the meaning of §4(b) of the Pennsylvania Human Relations Act (hereinafter the "PHRA").

3. Sheet Metal Production Workers' Union, Local 266 (hereinafter "Local 266") is a labor organization within the meaning of §4(d) of the PHRA.

4. All procedural prerequisites to a public hearing as set forth at §9 of the PHRA have been satisfied. Investigation, findings of probable cause and attempted conciliation of these charges were all completed prior to this litigation.

5. The Commission initiated complaint filed on December 22, 1970 at Docket No. E-4027 did not state alleged violations of the PHRA with sufficient particularity as required by the law of Pennsylvania and under Pennsylvania law, it was, therefore, a defective complaint and a nullity.

6. Under Pennsylvania law first announced in the PHRC's decision in these cases in 1981, the defective complaint filed at Docket No. E-4027 on December 22, 1970, did not toll the running of the PHRA 90 day statute of limitations.

7. Under Pennsylvania law the complaint of Elizabeth McNasby filed on June 11, 1971 at Docket No. E-4249 was found to be sufficiently particular to constitute a valid complaint with respect to the allegation related to McNasby individually; but not sufficiently particular to constitute a valid complaint with respect to the allegations relating to similarly situated females. Consequently the PHRC, in 1981, ruled that her complaint was not valid as a class action complaint and did not toll the running of the statute of limitations with respect to any allegations other than that relating to McNasby individually.

8. The amended complaint filed by the Commission on October 27, 1975 at Docket No. E-4027 was sufficiently particular so as to constitute a valid complaint under the PHRA.

9. Pursuant to the PHRC's decision in 1981, affirmed by the Commonwealth Court and the Pennsylvania Supreme Court, the amended complaint of October 27, 1975, albeit a valid complaint in its own right cannot relate back to the original complaint of December 22, 1970. The amended complaint is thus limited by the statute of limitations to addressing alleged violations of the PHRA which occurred within the period commencing on July 30, 1975, i.e., 90 days before the October 27, 1975 filing. All alleged illegalities pre-dating July 30, 1975

were held not redressable by the amended complaint solely on the ground that they were barred by the statute of limitations of the PHRA.

10. Allegations concerning all of the 13 individual complainants named in the amended complaint at Docket No. E-4027, except for Theresa Reed, relate to occurrences predating July 30, 1975. None of the named complainants other than Theresa Reed (and Elizabeth McNasby at Docket No. E-4249) had any employment relationship with Crown after 1974. Accordingly, all allegations of the individually named complainants other than Reed and McNasby were held by the PHRC to be barred solely because of the statute of limitations of the PHRA.

11. The PHRC ruled that although violations of the PHRA pre-dating July 30, 1975 (except those relating to McNasby), were not redressable in the action before it, evidence of historic patterns and practices of sex discrimination committed by Crown and Local 266 were relevant to the case and were properly received by the Commission hearing panel. PHRC further ruled that nothing in law prohibits the Commission from making Findings of Fact and Conclusions of Law concerning pre July 30, 1975 violations so long as those violations are not made the subject of any ordered remedy under the PHRA.

12. Delays in the processing of this matter from the December 22, 1970 filing of the original complaint to the October 27, 1975 filing of the amended complaint, albeit attributable primarily to PHRC staff, do not give rise to a defense of laches and have not deprived Crown or Local 266 of due process of law. Neither respondent has shown any substantial prejudice to have resulted from the delays and more significantly it has been determined that the statute of limitations proscribes any remedy under the amended complaint for violations pre-dating July 30, 1975.

13. Notwithstanding the lengthy delay between the filing of her complaint at Docket No. E-4249 on June 11, 1971 and the commencement of a hearing upon those consolidated cases on October 30, 1978, Elizabeth McNasby was faultless with respect

to that delay, is not guilty of laches, and thus redress of her claim is nor barred by reason of the delay.

14. The delay between the October 27, 1975 filing of the amended complaint and the October 30, 1978 commencement of the public hearing was not exclusively attributable to the PHRC and accordingly the defense of laches raised by both respondents cannot be sustained.

15. Section 9 of the PHRA which authorizes the Commission to initiate complaints of unlawful discriminatory practices implicity authorizes complaints on behalf of classes of aggrieved persons alleging patterns and practices of unlawful discriminatory conduct. Commission initiated complaints are not restricted to allegations on behalf of individual discriminatees.

16. At all times from July 9, 1969 to December 31, 1975, Crown engaged in a pattern and practice of discrimination based upon the sex, female, of applicants and employes in hiring, job assignment, job transfer, compensation, layoff, and recall from layoff, on a continuing basis.

17. Respondent Crown's failure to recruit and hire females while recruiting and hiring males throughout the period from July 9, 1969 to December 31, 1975 constitutes a continuing pattern or practice of discrimination on the basis of sex in violation of §5(a) of the PHRA, 43 P.S. §955(a).

18. Respondent Crown's actions and continuing pattern and practice of assigning females to jobs based upon their sex, and in establishing and maintaining a system of male jobs and female jobs, constitutes discrimination on the basis of sex in violation of §5(a) of the PHRA, 42 P.S. §955(a).

19. Respondent Crown's failure to award overtime work to female employes on the same basis as it was awarded to male employes constitutes a continuing pattern and practice of discrimination on the basis of sex in violation of §5(a) of the PHRA, 43 P.S. §955(a).

20. By establishing and maintaining sex-segregated seniority rosters, laying off female employes with greater plant seniority than males, recalling laid off males with less seniority while females on layoff status were not recalled, hiring males while females remained in layoff status, Crown has engaged in a

continuing pattern and practice of sex discrimination in violation of §5(a) of the PHRA, 43 P.S. 6955(a).

21. The seniority system utilized by Crown and Local 266 to the extent it employed and continues to employ sex-segregated plant, department, and shift seniority had and continues to have a disparate pervasive unlawful impact upon female employes at Plant No. 1 in the production and maintenance unit.

22. The seniority system as administered by Crown and Local 266 in the context of layoffs, and recall from layoff status had and continues to have a disparate pervasive unlawful impact upon female employes at Respondent Crown's Plant No. 1 in the production and maintenance unit.

23. During the period July 9, 1969 to December 31, 1975, the sex-segregated job classification and seniority systems employed by Crown and acquiesced to by Local 266 disproportionately disadvantaged female employes with respect to job assignments, job transfer, compensation, layoff, and recall from layoff. The present continuing effects of these past practices would be unlawfully discriminatory even in the absence of renewed acts of discrimination.

24. The sex-segregated job classification and seniority systems historically employed by Crown inhibited the movement of Elizabeth McNasby upward through the production and maintenance ranks at Crown as occurred with other women. This left her with artificially low department seniority in 1971. Thus, continued lay-offs she suffered in her inspection position were illegal consequences of a seniority system which disproportionately disadvantaged women and are therefore remediable.

25. The sex-segregated job classification and seniority systems employed by Crown and acquiesced to by Local 266 were justified by neither any bona fide occupational qualification nor by any business necessity.

26. The seniority system, to the extent that it utilizes seniority measures other than plant seniority and to the extent that it perpetuates the effects of past discriminatory practices, is unlawful.

27. Respondent Crown's current system of sex-segregated job classification and plant seniority is unlawful per se and must be integrated for all purposes.

28. Respondent Crown's current system of department and shift seniority is unlawful in its effects and may not be used as a basis for job advancement, layoffs, or recall to employment unless plant seniority among competing employes is equal.

29. While Crown and Local 266 allege, in effect, that many female employes knowingly and intentionally waived their rights to equal employment opportunity, such rights cannot be prospectively waived.

30. The alleged "waivers" proffered as a defense by Crown and Local 266, were not informed, knowing waivers nor were they legally binding.

31. Local 266 has a duty to afford equal representation to its female members and to accord them full and equal membership rights.

32. Local 266 repreatedly discriminated against female employe members:

(i) by failing to process the grievance of female members complaining of the sex discriminatory acts and practices of Respondent Crown;

(ii) by improperly encouraging and misleading many female members to sign alleged waivers of their rights to equal employment opportunity;

(iii) by failing and refusing to enforce the nondiscrimination provision of its applicable collective bargaining agreements with Crown;

(iv) by failing to protest against or bargain for an end to the illegal practices of Respondent Crown which adversely affected female Local 266 members; and

(v) by aiding and abetting Respondent Crown in its continued pattern of employment discrimination.

These acts and policies constitutes sex discrimination in violation of §5(c) and §5(e) of the PHRA, 43 P.S. §955(c) and (e).

33. Respondent Local 266 violated the PHRA by requiring the payment of dues while employes were in layoff status and/or by requiring the payment of reinstatement fees as a condition of obtaining reinstatement to employe status from layoff. These requirements, in the context of Crown's sex-segregated layoffs, disproportionately disadvantaged females in violation of §5(c) of the PHRA, 43 P.S. §955(c).

34. Local 266 has contended that female employes failed to complain or file grievances concerning sex discrimination and generally failed to avail themselves of the union's participatory processes whereby they could have made counterdiscrimination suggestions relating to future union collective bargaining efforts. Even to the extent that these contentions are true, female employes have not thereby waived any rights to non-discriminatory treatment and are not thereby estopped from raising a challenge to Local 266's discriminatory conduct.

35. A proper element of the relief to be awarded is back pay for each eligible female discriminatee equal in gross amount to the differences between that which she actually earned from employment at Crown or elsewhere during the period from July 30, 1975 to December 31, 1975 and that which she would have earned at Crown during the same period had she been extended the equal employment opportunities to which she was entitled under the PHRA.

36. A similar award is appropriate for Elizabeth McNasby dating from the filing of her complaint on June 11, 1971 to December 31, 1975.

37. The inability of the hearing panel to determine from the record the precise amount of back pay appropriately awarded to Elizabeth McNasby and members of the class of discriminatees with redressable claims under the amended complaint at Docket No. E-4027 does not preclude the awards of back pay set forth in the attached Final Order as those awards are based upon reasonable calculations supported by the evidence.

38. Females who, should they now be assigned to jobs previously classified as male jobs, would otherwise be subject to wage reductions because of Crown's departmental or shift

seniority system are legally entitled to have their current wage rates "red-circled" or maintained at a rate equivalent to the rate a woman could attain through the use of her plant seniority until such time as she rises within an integrated department to a job code level with the appropriate corresponding or higher wage rates.

39. A proper element of relief is the required institution of a bona fide, good faith and effective training program to enable female employes to enter jobs and departments from which females have previously been excluded. Under the circumstances, a step-by-step procedure of learning the necessary skills for advancement within departments by on-the-job experience at lower level jobs would unfairly delay the discriminatees reaching their rightful place within the hierarchy of jobs at Plant No. 1 unless it is demonstrated that experience in the lower rated job is a business necessity.

BY THE COURT:

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J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH MCNASBY, on behalf of herself and all others similarly situated	:	CIVIL ACTION
v.	:	
CROWN, CORK & SEAL CO., INC., et al.	:	NO. 82-4258

MEMORANDUM AND ORDER

GILES, J. JANUARY 14, 1987

AND NOW, this 14th day of January, 1987, upon consideration of defendant Crown Cork and Seal Co., Inc.'s motion to dismiss, or alternatively, for summary judgment, and plaintiffs' response thereto, it is hereby ORDERED that defendants' motion is DENIED.

1. The findings of fact on the merits by the Pennsylvania Human Relations Commission (PHRC), as to both the McNasby individual complaint and the PHRC's complaint, left undisturbed by subsequent state judicial review, are entitled to preclusive effect in this court under the principles of collateral estoppel. The PHRC resolved disputed issues of fact before it in which all parties to this lawsuit had an adequate opportunity to litigate. In so doing, it acted in a judicial capacity. "[I]t is sound policy to apply principles of some preclusion to the factfinding of administrative bodies acting in a judicial capacity." *University of Tennesee v. Elliott*, 54 U. S. Law Week 5084, 5087 (June 24, 1986.)[1]

2. However, the PHRC remedy given to the victims of the discrimination is not entitled to *res judicata* effect. The PHRC

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1. In University of Tennessee v. Elliott the Court approved the applicability of 28 U.S.C. §1738 to factfinding of state administrative agencies acting in a judicial capacity.

acting within its authority,[2] provided chiefly an injunctive remedy to the aggrieved plaintiffs. The PHRC stated that its primary objective was to vindicate the public interest by enjoining the on-going illegal conduct. The remedy fashioned by the PHRC for McNasby and the other class members denied to them on their federal claims the make-whole remedy to which they were entitled under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq*. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

3. Moreover, to deny McNasby and the other claimants remedial action under Title VII when the PHRC found that their sex discrimination claim was meritorious would be manifestly unfair. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 147 461, 481 (1982), the Court held that in a Title VII case a federal court should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless, but that "[R]e-determination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation," quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979). While an injunctive remedy may alone satisfy the remedial requirements of state law, the Title VII claims cannot be extinguished under principles of *res judicata* in the absence of a "make-whole" remedy.

4. The McNasby complaint was found by the PHRC to include a class action claim on behalf of all Crown Cork and Seal females who were prevented "from enjoying equal job opportunities" at the corporation's plant. (A-64-A-65). However, the class aspects of the complaint were stricken as void because they were not sufficiently particular to meet the pleading requirements of the PHRA. The particularity pleading requirement of the PHRA[3] was wholly derived from Pa. Code C.P. 1019 as distinguished from the notice pleading and filing requirements of Fed. R. Civ. P. 8 and Title VII of the Civil Rights Act of 1964,

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2. Pa. Stat. Ann. tit. 43, §951, 959(8).
3. 43 Pa. Stat. Ann. §959 (Supp. 1986).

42 U.S.C. §2000e-5(e)(1981). This particularity pleading requirement was used by the defendants to obtain a ruling that the class allegations were invalid and had no tolling effect on the applicable PHRA statute of limitations. The merits of the class claims in McNasby's complaint were never reached by the PHRC or the state courts. McNasby was deprived of the opportunity to litigate the merits of the class claim for females covered by her complaint solely because of a state law pleading requirement.

5. The particularity pleadings requirement of the PHRA cannot preclude a substantive remedy on the merits of the plaintiff's Title VII claim. Despite the fact that the discrimination complained of by both McNasby and the class of claimants was found to require injunctive relief as of May 10, 1982, PHRC's counsel failed to present sufficient evidence on their behalf from which the PHRC could make reliable backpay calculations for each individual beyond December 31, 1975. The injunctive relief did not make McNasby or the class of claimants whole. Therefore, the PHRC did not provide complete relief to McNasby or the class of claimants. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65. Since full backpay relief was not granted in the state forum for McNasby, or the class of claimants, the plaintiffs can exercise their supplemental right to sue in federal court. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §706(f)(1).

6. Further, although it had authority to award backpay for a period pre-dating the filing of the complaint by more than 90 days, the PHRC exercised its discretion to circumscribe the backpay award to the members of the class in the Commissioner's complaint, excluding McNasby, to a period 90 days prior to the filing of the Commissioner's complaint. 43 Pa. Stat. Ann. tit. 43 §959(f) (Supp. 1986). The cited reason for this exercise of discretion was that the primary objective of the PHRC was not to redress completely the individual complaints but to vindicate the public interest through injunctive relief. Where the state forum's remedy objectives are inconsistent with that available to

the individual under Title VII, the complainant may look to the federal court to design a remedy to satisfy the federal statute's purposes.

7. It cannot be fairly said that the individual interests of McNasby, or of the other class complainants, were sought to be protected or vindicated fully within the context of the PHRC's complaint or the Commission counsel's representation. The PHRC's factfinding of continuing discrimination entitled McNasby or other class claimants to make-whole relief. Further, McNasby was denied the right to represent herself or to have counsel represent her individual interests in formulating a "make-whole" remedy. *See* 45 Pa. State. §9.

8. The issues presented in this case are subject to redetermination in the federal court because of the fairness of the procedure followed by the PHRC. McNasby is entitled to a redetermination of her own entitlement to monetary relief for a period of two years prior to the filing of her EEOC charge and for the period after December 31, 1975 because the PHRC circumscribed her relief to accomplish something other than "make-whole" relief to which she was entitled, and the PHRC attorneys failed to demonstrate on her behalf to the PHRC a means for calculation of her backpay entitlement. She is entitled to pursue the class aspects of her Title VII charge because the PHRC precluded the class aspect of her complaint due to a pleading requirement peculiar to the PHRA and at odds with the fair notice provisions of the Federal Rules of Civil Procedure and Title VII. There were discriminatory practices proven to the satisfaction of the PHRC, yet for reasons unrelated to the merits or the conduct of the complainants, they were deprived of a remedy fairly comparable to that required to be given under federal law.

9. McNasby's Title VII action is not barred by principles of *res judicata* and she is, therefore, a competent class representative in this federal action.

10. The contention of Crown Cork & Seal that McNasby waived her Title VII claim by executing a waiver form is without merit. Waiver of an employee's federally created employment

rights is not to be lightly inferred. *Equal Employment Opportunity Commission v. U. S. Steel Corp.*, 583 F. Supp. 1357 (1984). There was no consideration given by the defendant for the release of important federal claims. She was entitled to the sums paid by the defendant as a result of the state court judgment in her favor. Nothing was paid to McNasby that she should not have been paid anyway. Moreover, the release purported to cover only allegations set forth in the PHRC cases. No reference in the waiver was made to the Title VII charge or federal court complaint.

BY THE COURT:

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J.